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IN THE

Supreme Court of the United States

October Term 1974

NO. _____

DR. JAMES D. CLEMENTS, Director of the Georgia Mental Retardation Center, Individually,

Petitioner,

- v -

ANDREW S. FARACA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Dr. James D. Clements, Director of the Georgia Mental Retardation Center, State of Georgia, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this action on January 17, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not yet reported. A copy is attached hereto as Appendix A. The opinion of the United States District Court for the Northern District

of Georgia was not reported. A copy is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on January 17, 1975, and this petition for a writ of certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the doctrine of qualified immunity appertains to an executive official of the State of Georgia who is sued under 42 U.S.C. § 1981 after making a decision, in utmost good faith and without malice, to deny the request of an interracially mixed married couple for employment as surrogate parents to administer and supervise a cottage of mentally retarded children.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amend. XIV, § 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1981:

"All persons within the jurisdiction of the United States shall have the same right in every State and

Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

28 U.S.C. § 1343:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

* * * *

* * * *

* * * *

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

STATEMENT OF THE CASE

The Petitioner has been personally mulcted in damages for making a good-faith decision, based undeniably and clearly on his sincere concern for his official responsibilities, which failed to accurately predict the future drift of constitutional law. The manner in which this occurred is set out briefly as follows.

Respondent is a white citizen of the United States. His wife is a black citizen. During the Summer of 1971, they lived in Tampa, Florida, but made a brief visit to Atlanta in July. While in Atlanta, Respondent and his wife visited the Georgia Mental Retardation Center and interviewed for possible employment.

The Center is one of the "bright lights" in Georgia's

public mental health program. [App. B, p. 3b].[1] It was created in 1964 as a research and treatment center with units in Atlanta and Athens, Georgia, currently housing over 550 resident retarded children, and treating an additional 200-plus outpatients. Of the total patients, 90 percent are severely retarded, 9 percent are trainable, and only 1 percent are educable. [App. B, p. 4b]. The Center is operated under the auspices and authority of the Georgia Department of Human Resources.

Petitioner was appointed as the Center's first Director (Superintendent) and has been its only Director since its inception. As such, Petitioner has been largely responsible for the Center's success. He holds a bachelor's degree, a medical degree, was the recipient of a Yale fellowship in mental retardation as a pediatric specialist and has undertaken special study in government administration. There is absoluteiy no doubt as to his ability, intelligence, and dedication to the Center's success. [App. B, p. 4b].

The Center operates in Atlanta under a cottage system of administration. The retarded children live in each of the more than twenty cottages, and each cottage is headed by a Cottage Program Administrator. The Administrator's job requires that he live in the cottage and further requires that his spouse live with him. Together, they must be responsible twenty-four hours a day for the cottage's operation in the role of surrogate parents to the children. They must administer to the children, supervise the teachers (Cottage Program Specialists) who work in the cottages on a shift basis, and

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[1] Designations such as [App. B, p. 3b] refer to the opinions attached as the appendix to this Petition.

receive the children's parents and the visiting public. At the very least, a demanding and sensitive position.

Respondent interviewed with three of the Petitioner's employees at the Center and specifically applied for a job as one of the children's teachers (Cottage Program Specialist). [App. B, p. 6b]. The persons with whom he interviewed, however, felt him over-qualified for this position, and suggested he seek the position of Administrator.[2] This suggestion was endorsed by the supervisor of the cottage system, one of Petitioner's employees, but, instead of immediately hiring the Respondent as an Administrator, this employee elected to confer with the Petitioner. Petitioner vetoed the idea based on his good-faith concern about the effect of interracially mixed surrogate parents on the children, their real parents, and the public.[3] However, employment as a teacher (Specialist) was specifically authorized for Respondent and Petitioner also requested Respondent be told to come and meet with him to discuss more re-

[2] Respondent attended college for nine years and holds two degrees with additional certificates in childhood training. He has studied for the ministry and is highly motivated in the area of social improvement for the lot of the poor, the black, and the ill-educated. [App. B, p. 3b].

[3] Petitioner was found, as a matter of fact, to be anything but racist. His denial of the Administrator's position to Respondent was patently reasoned on the projected opinions of others, not that of his own personal desires. Petitioner demonstrated general compliance with the laws against racial discrimination and had a sincere concern for the Center about the effects of an interracial couple performing as surrogate parents. His action toward Respondent was not personal or malicious, but the result of his sincere belief and concern. [App. B, p. 9b, 10b, 13b]. General compliance with the law is demonstrated by the fact that the Center is thoroughly integrated both as to patients and staff. Fifty percent of the staff members administering the cottage system are black, 31 percent of the entire Center staff is black and two-thirds of that 31 percent are employed at the administrative level. [App. A, p. 5a].

munerative employment possibilities at the Center. [App. B, p. 9b]. Petitioner was informed that Respondent was not interested in anything but the Administrator's job. [App. B, p. 9b]. The Respondent and his wife returned to Tampa and filed this suit against Petitioner on November 2, 1971, alleging a breach of their rights under 42 U.S.C. § 1981 and the Fourteenth Amendment to the U.S. Constitution. The jurisdiction of the district court was invoked pursuant to 28 U.S.C. § 1343(4).

After trial before a district court judge, an order was entered on September 19, 1973, dismissing the Respondent's wife's claim, discharging the Center as a party-defendant, and imposing a judgment for $7,188.75 against Petitioner in favor of Respondent.[4] The Fifth Circuit affirmed this judgment on January 17, 1975, holding that Petitioner had tortiously interfered with Respondent's right to contract. [See Appendix A].

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[4] The Respondent and his wife returned to Tampa in July, 1971, and subsequently were employed by the Hillsborough, Florida public school system. Mrs. Faraca's claim was dismissed because she suffered no economic loss, the Center was discharged in view of the Eleventh Amendment to the U.S. Constitution and because the evidence showed no need for injunctive relief. The award to Respondent was the mathematical difference between what he earned in Tampa and what he would have received at the Center between the time of his interview and the trial. [See Appendix B].

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS RAISES A VITAL AND IMPORTANT QUESTION AFFECTING EVERY FEDERAL COURT IN OUR NATION AS TO THE APPLICABILITY OF QUALIFIED IMMUNITY AS A DEFENSE TO A CIVIL RIGHTS LAWSUIT, THE BASIS AND NATURE OF WHICH HAS NEVER BEFORE BEEN CONSIDERED BY THE SUPREME COURT.

It is clear that some degree of qualified immunity from damages exists for executive-level governmental officials who act without malice and in good faith and are later sued personally because of their actions. The problem lies in pinning it down and determining the correct standard for its application. Until recently, various standards for the qualified immunity of executive officials dispersed kaleidoscopically throughout the lower courts. *See, e.g., Roberts v. Williams*, 456 F.2d 819 (5th Cir. 1972); *Simcox v. Board of Education of Lockport*, 443 F.2d 40 (7th Cir. 1971); *Tilendis v. McLaughlin*, 398 F.2d 287 (7th Cir. 1968); *Morgan v. Labiak*, 368 F.2d 338 (10th Cir 1966); *Joyce v. Ferrazzi*, 323 F.2d 931 (1st Cir. 1963); *Eilenburg v. Shepherd*, 304 F. Supp. 1959 (E.D. Tenn. 1966), *aff'd*, 406 F.2d 1331 (6th Cir. 1969), *cert. den.*, 393 U.S. 1087 (1969). The concept was enshrouded in a fog of catchwords and phrases. Uncertainty was the only thing certain.

Then, in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), this Court unanimously took a giant leap toward the articulation of a usable standard for the application of qual-

ified immunity. *Scheuer* emanated from the civil disorder on the Kent State University Campus in Ohio during May, 1970. Personal representatives of the estates of three students who died in that disorder sought damages under 42 U.S.C. § 1983[5] from the Governor, the Adjutant General and his Assistant, various named and unnamed officers and enlisted members of the Ohio National Guard, and the president of the University. The Court concluded in *Scheuer* that a qualified immunity was available to officers of the executive branch of government, in varying scope. The scope depended upon the range of discretion and responsibilities of the office and the circumstances as they reasonably appeared at the time action was taken which later formed the basis of alleged liability. The Court said at p. 247-8 of *Scheuer* that:

> "It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Although not exhaustively explored and treated[6], the standard seemed to be crystallizing. Qualified immunity

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[5] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[6] At page 249 of *Scheuer* Mr. Chief Justice Burger pointed out that since the district court had dismissed the complaint on motion, and there was no evidentiary record on appeal, the case presented "... no occasion for a definitive exploration of the scope of immunity available to state executive officials. ..."

was clearly available for executive public officials who, in view of the discretion and responsibilities attendant to their office, and under the circumstances as they appeared, acted (1) reasonably, and (2) in good faith.

More recently, however, in the case of *Wood v. Strickland*, __ U.S. __, 43 U.S.L.W. 4293 (February 25, 1975), this Honorable Court has enunciated, in a five-four decision, what seems to be a more demanding standard. In Part II of the Court's opinion in *Wood*, Mr. Justice White states the immunity test to require that an official:

> ". . . be acting sincerely and with a belief that he is doing right . . . (but he cannot ignore or disregard) . . . settled, indisputable law. . . ." (Parenthetical matter supplied.) 42 U.S.L.W. at 4298.

Also, the public official must be:

> ". . . held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges. . . ." 42 U.S.L.W. at 4298.

As Mr. Justice Powell points out in the dissent in *Wood*, the requirement of the ordinary public official's knowledge of "settled, indisputable law" and "unquestioned constitutional rights" seriously erodes the substance of the doctrine of qualified immunity. The giant leap taken in *Scheuer* toward making the uncertain certain is erased less than one year later, and now the inconsistency in the good-faith standards applied by the lower courts will certainly explode into chaos.

Courts, lawyers and scholars cannot even agree on what is "settled, indisputable law", or what "unquestioned constitutional rights" are. Daily, claims for relief are being adjudicated to be under the penumbra of

"civil rights" which years or even the day before were not. (*See, e.g.*, footnote 3 of the dissent in *Wood*, 43 U.S.L.W. at 4300.) Instead of having the guidelines of *Scheuer*, public officials will now be required to know what "unquestioned constitutional rights" are and they may find out, in the very lawsuit against them, that their good-faith belief as to the applicable law was mistaken and that particular law now is determined to have been "settled" adversely to them.

It is respectfully urged that the writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit because of the vital importance of the question presented as to the scope of qualified immunity.

II.

THE DECISION OF THE COURT OF APPEALS CONFLICTS IN PRINCIPLE WITH THIS HONORABLE COURT'S DECISIONS ON THE SCOPE AND APPLICATION OF THE QUALIFIED IMMUNITY ALLOWED EXECUTIVE OFFICIALS OF GOVERNMENT.

The Civil Rights Act codified as 42 U.S.C. § 1983[7] must be construed within a background of tort liability that makes a person responsible for the natural consequences of his acts. *Monroe v. Pape*, 365 U.S. 167 (1961). Accordingly, defenses typical of a tort cause of action exist as defenses to these violations. *Pierson v. Ray*, 386 U.S. 547 (1967). The same is true as to causes of action and defenses under 42 U.S.C. § 1982.[8] *See*,

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[7] *Ibid*, fn. 5.

[8] "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

e.g., Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); *Jones v. Mayer*, 392 U.S. 409 (1968). No less should be true of 42 U.S.C. § 1981. *See, Jones v. Mayer, supra.*

Respondent's claim for relief was predicated solely on 42 U.S.C. § 1981. The opinion of the court of appeals, for the very first time, has now engrafted a new "prima facie" tort into the framework of § 1981. Section 1981 has now been determined to proscribe the tortious interference with anticipated contractual benefits. [See Appendix A, p. 8a].

It is respectfully submitted that whichever of the qualified immunity tests is applicable, *Scheuer* or *Wood*, the court of appeals' opinion conflicts with the opinions of this Court. If *Scheuer* is to be the general test, the court of appeals has failed to accord Petitioner the proper qualified immunity even though his actions were *reasonable* and made in *good faith* in light of the discretion of his office, his responsibilities to the children and the public, and in view of all the attendant circumstances. If the more restrictive test in *Wood* is to be applied, then his actions were still sincere and in utmost good faith and were not in violation of "settled, indisputable law". When Petitioner denied employment in one unique position to Respondent in 1971, there was nothing "settled" about § 1981's proscription of the constitutional right to be free from interference with anticipated contractual benefits. It has now become "settled" law in Petitioner's case, and certainly cannot be said to have been "unquestioned" or "settled" before this very point in time. As was stated by this Court in *Pierson v. Ray, supra*, which recognized the good-faith defense for police officers sued under the Civil Rights Acts:

> "A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." 386 U.S. at 555.

In comparing *Scheuer* to *Pierson*, this Honorable Court declared that:

> "When a court evaluates police conduct relating to an arrest its guideline is 'good faith and probable cause.' In the case of higher officers of the executive branch, however, the inquiry is far more complex since the range of decisions and choices—whether the formulation of policy, of legislation, of budgets, or of day-to-day decisions—is virtually infinite. . . . Like legislators and judges, these officers are entitled to rely on traditional sources for the factual information on which they decide and act." 416 U.S. at 245-6.

When judges, lawyers and scholars disagree as to what is "unquestioned" law, the Petitioner should not be required to predict that the courts will one day notice or discover that the tort of interference with anticipated contractual benefits has been interpolated into 42 U.S.C. § 1981.

The conflict in principle between this Court's opinions and the decision of the court of appeals justifies the issuance of a writ of certiorari to review the judgment and opinion of the Fifth Circuit.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Mr. and Mrs. Andrew Stephen FARACA,
Plaintiffs-Appellees,

v.

Dr. James D. CLEMENTS, Individually, et al.,
Defendants-Appellants.

No. 74-1526.

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 1975.

Suit was brought for injunctive and monetary relief because of alleged racial discrimination by director of Georgia mental retardation center which interfered with plaintiff's right to contract for employment in violation of civil rights statute granting all persons the right to make and enforce contracts and in violation of constitutional guaranties. The United States District Court for the Northern District of Georgia, at Atlanta, Sidney O. Smith, Jr., J., entered a judgment awarding plaintiff compensatory damages and the director appealed. The Court of Appeals, Clark, Circuit Judge, held that the Civil Rights statute does cover refusal to enter into a contract and that the director was properly held personally liable for compensatory damages for refusal to employ plaintiff on ground that it would not be proper to have a racially mixed couple in the cottage administrator's position.

Affirmed.

1. Civil Rights 3

Civil rights statute, granting all persons the same rights to make and enforce contracts, is not intended to only proscribe a breach of contract but also covers the refusal to enter into a contract; Congress must have meant to protect black citizens from racially based interference with prospective contract rights. 42 U.S.C.A. § 1981.

2. Civil Rights 38

Although action against director of Georgia mental retardation center under civil rights statute for failure to hire Caucasian plaintiff for position because his wife was a black was not denominated as an action for tortious interference with making of contract, the lack of formality was not fatal to plaintiff's right to recover since the basic right to relief had been declared to exist by statute. 42 U.S.C.A. §§ 1981, 1982.

3. Civil Rights 46

Caucasian plaintiff, who was married to black woman and who was refused employment by director of Georgia mental retardation center as cottage administrator on grounds that a racially mixed couple should not be hired, was entitled, under Civil Rights statute granting all persons the right to make and enforce contracts, to recover compensatory damages from director consisting of the difference between what plaintiff would have made as a cottage administrator and what he actually did make during the period in question. 42 U.S.C.A. § 1981.

4. Civil Rights 46

Director of Georgia mental retardation center who refused to employ plaintiff as a cottage administrator

on grounds that director did not believe it was proper for racially mixed couple to assume position was properly held personally liable for compensatory damages to plaintiff under civil rights statute granting all persons the right to make and enforce contracts, notwithstanding director's claim that he proceeded on the basis of a good faith concern for the consequences which would flow from employment of plaintiff and not out of any personal bias or prejudice. 42 U.S.C.A. § 1981.

5. Civil Rights 13.10

While public official's execution of his duties in good faith belief that the law requires him to execute duties in such manner may constitute legitimate defense to racial discrimination claim by injured party, the knowing failure to obey law against racial discrimination in good faith fear of consequences which could ensue does not constitute a legitimate defense to claim of racial discrimination. 42 U.S.C.A. §§ 1981, 1982.

Appeal from the United States District Court for the Northern District of Georgia.

Before MORGAN and CLARK, Circuit Judges, and RUBIN, District Judge.

CLARK, Circuit Judge:

This is a suit for injunctive and monetary relief for racial discrimination which interfered with the right to contract for employment in violation of 42 U.S.C. § 1981.[1] Plaintiffs, Andrew Faraca, a Caucasian, and

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[1] Section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and

his wife, Ophelia, a black, brought this action against Dr. James D. Clements, the Director of the Georgia Retardation Center, individually, and against the Georgia Retardation Center (Center), requesting an order enjoining the defendants from engaging in discriminatory employment practices and seeking general, special and punitive damages, attorneys' fees and costs. The trial court, sitting without a jury, found that Dr. Clements' actions in refusing to hire Mr. Faraca were racially discriminatory, and assessed damages in the amount of 7,188.75 dollars against Dr. Clements personally. The court refused to assess damages against the Center.[2] This award represented the difference between Mr. Faraca's earnings as a teacher and the sum he would have earned if he had been employed by the Center in the position he sought.[3] The trial court, however, denied the requested injunctive relief, based upon plaintiffs' failure to prove a policy, custom, or usage of racial discrimination by either defendant. The court further refused to award punitive damages, finding that there was no malice and that Dr. Clements had no prior specific knowledge of the impropriety of his actions. Finally, the trial court denied the plaintiffs' prayer for attorneys' fees. Appellees did not cross appeal. We affirm.

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enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

[2] The district court ruled that as a State agency, the Center could not be subjected to monetary liability. *See, Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

[3] The district court concluded that Mrs. Faraca's negotiations had not ripened to such a point as to evince employment discrimination on the basis of race and consequently refused to award her damages.

The following facts found by the trial court are amply supported by the record. The Center was conceived by the Georgia General Assembly in 1964 as a research and treatment center, and began operation in 1969 with facilities in Atlanta and Athens. Dr. Clements was appointed as the Center's first superintendent and is largely responsible for its success.

The combined Atlanta and Athens units house 550 resident retarded children and treat an additional 200 outpatients. Of these 750 children, 90% are classed as severely retarded, 9% as trainable, and only 1% as educable. The Center is thoroughly integrated by race and has been since inception, both as to patients and staff. Fifty percent of the staff members in the Division of Community Living are black, 31% of the entire Center staff is black and two-thirds of that 31% are employed at the administrative level.

Employment with the Center during 1971, the year in which the Faracas applied, was effected by obtaining approval of the appropriate supervisor and then going through the Personnel Director who formalized the employment. As a state facility, the Center's acceptance of an applicant is subject to certification by the State Merit Board; but, because it was a new facility, a person accepted for employment by the Center in 1971 was certified and approved by the Merit Board virtually as a matter of course.

In July of 1971 the Faracas filled out employment applications with the Center. Mr. Faraca specifically sought employment as a Cottage Program Specialist,[4]

[4] The Center utilized a "cottage system" in which the Center's resident population was divided into units, each of which was housed and trained separately.

while Mrs. Faraca made an "open" application, hopeful that she and her husband could both obtain employment with the Center. A Center employee who initially interviewed Mr. Faraca for the Specialist position suggested that, in light of Faraca's impressive credentials,[5] Faraca apply for the post of Cottage Program Administrator.[6] Each Cottage Program Administrator is required to live in an adjacent apartment with his spouse and both are responsible 24 hours a day for the Cottage's operation and for the welfare of the children as "surrogate parents".

The following day Mr. Faraca met with a Dr. Mills, the Director of Community Living, who was responsible for interviewing Cottage Administrator applicants. Dr. Mills stated during trial that he considered Faraca the best-qualified applicant he had interviewed, and that he was satisfied that Faraca should have been immediately hired. After so satisfying himself, all that remained was for Mills to route the application to Personnel for certification. Upon these facts, the trial court concluded that there was no doubt that, considering Faraca's qualifications, his application would have been routinely granted and that nothing remained for him to do to perfect his application and employment.

After determining the desirability of employing Mr. Faraca, Dr. Mills, rather than sending the application directly to Personnel, notified Dr. Clements of his intent

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[5] Mr. Faraca has nine years of college training and holds two degrees with additional certificates in child training. His wife also has a college degree and has done post-graduate work. At the time of the incident at issue, both plaintiffs had teaching experience.

[6] The Cottage Program Administrator heads a cottage unit and supervises three shifts of Cottage Specialists and assistants.

to hire Mr. Faraca.[7] Clements, voicing grave concern about the effects of the racially mixed couple on visitors and possible adverse reactions from state legislators, instructed Mills not to hire Faraca for the position of Cottage Administrator. Dr. Clements did, however, authorize Mills to offer Faraca employment as a Cottage Specialist. Faraca no longer desired that post.

[1] On appeal, Dr. Clements first contends that Section 1981 was only intended to proscribe a breach of contract, not, as in this case, the refusal to enter into a contract. We disagree. The statute expressly equalizes the right of all citizens "*to make* and enforce contracts". By specifically protecting the right to make contracts Congress must have meant to protect black citizens from racially based interference with prospective contract rights, otherwise the words italicized would be redundant. In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 442, 88 S.Ct. 2186, 2204, 20 L.Ed.2d 1189 (1968) at fn. 78, the Supreme Court stated that "the right to contract for employment [is] a right secured by 42 U.S.C. § 1981". If Section 1981 did not afford protection prior to execution, the remedy it sought to create could be thwarted in many instances by the expedient of refusing to contract with blacks. Decisions from other jurisdictions are in conformity with today's holding. *E.g., Waters v. Wisconsin Steel Works of Internat'l Harvester Co.*, 427 F.2d 476 (7th Cir.), cert. denied, 400 U.S. 911, 91 S.Ct. 137, 27 L.Ed.2d 151 (1970); *Scott v. Young*, 307 F.Supp. 1005 (E.D.Va.1969), aff'd, 421 F.2d 143, cert. denied, 398 U.S. 929, 90 S.Ct. 1820, 26 L.Ed.2d 91 (1970); *see Valle v. Stengel*, 176 F.2d 697

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[7] Dr. Clements had directed Mills to notify him regarding any application which Mills considered controversial.

(3d Cir. 1949); *Gonzales v. Fairfax-Brewster-School Inc.*, 363 F.Supp. 1200 (E.D.Va.1973).

[2] Technically, the State of Georgia was the prospective employer and only it would be in a position to refuse to enter into a contract. If Dr. Clements is subject to liability under Section 1981 such liability must be assessable for *interfering* with the right to contract. Although the present action against Dr. Clements was not denominated as one for tortious interference with the making of a contract, this lack of formality is not fatal since the basic right to relief has been declared to exist. The courts in their broad interpretation of Section 1981 and 1982 (both of these statutes are derived from Section 1 of the Civil Rights Act of 1866, 14 Stat. 27) have held that a third party's interference with those rights guaranteed under Sections 1981 and 1982 will subject such a person to personal liability. *E.g.*, *Hernandez v. Erlenbusch*, 368 F.Supp. 752 (D.Or.1973); *Bennett v. Gravelle*, 323 F.Supp. 203 (D. Maryland), aff'd, 451 F.2d 1011 (4th Cir. 1971), cert. denied, 407 U.S. 917, 92 S.Ct. 2451, 32 L.Ed.2d 692 (1972); *Walker v. Pointer*, 304 F.Supp. 56 (N.D.Tex.1969). The Supreme Court's ruling in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237, 90 S.Ct. 400, 404, 24 L.Ed.2d 386 (1969) is controlling on this point. That action concerned the appropriateness of a claim under Section 1982 which asserted an interference with the equal right to lease. The court stated:

> The right to "lease" is protected by § 1982 against the actions of third parties, as well as against the actions of the immediate lessor. Respondents' [Swimming Club Association] actions in refusing to approve the assignment of the membership share in this case was clearly an interference with

> [petitioner's] right to "lease." A narrow construction of the language of § 1982 would be quite inconsistent with the broad and sweeping nature of the protection meant to be afforded by § 1 of the Civil Rights Act of 1866, 14 Stat. 27, from which § 1982 was derived.

See also Hurd v. Hodge, 334 U.S. 24, 68 S.Ct. 847, 92 L.Ed. 1187 (1948). It would be logically inconsistent not to apply the *Sullivan* interpretation with equal force to a suit for interference with the right to contract guaranteed by Section 1981 since, as mentioned previously, it is also derived from Section 1 of the Civil Rights Act of 1866 and thus should enjoy the same broad interpretation of its breadth of coverage. *Grier v. Specialized Skills, Inc.*, 326 F.Supp. 856, 860 (W.D. N.C. 1971). *See Jones v. Alfred H. Mayer Co., supra; Young v. International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971); *Boudreaux v. Baton Rouge Marine Contracting Co.*, 437 F.2d 1011 (5th Cir. 1971); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), cert. denied, 401 U.S. 948, 91 S.Ct. 935, 28 L.Ed.2d 231 (1971); *Scott v. Young, supra.*

[3] Dr. Clements further contends that compensatory damages may not be imposed upon a claim for relief under Section 1981. However, the propriety of such an award in a Section 1981 action is well recognized in this circuit. *E.g., Sanders v. Dobbs Houses, supra; Mizell v. North Broward Hospital Dist.*, 427 F.2d 468 (5th Cir. 1970). *See also Sullivan v. Little Hunting Park, Inc., supra*, 396 U.S. at 239, 90 S.Ct. at 405, in which the Supreme Court stated, "[t]he existence of a statutory right implies the existence of all necessary and appropriate remedies;" and *Waters v. Wisconsin Steel Works of Internat'l Harvester Co., supra*, 427 F.2d at 488, in

which the Seventh Circuit stated that a plaintiff's relief under Section 1981 "is potentially as broad as that available in [an] action . . . under Title VII."

The damages awarded in this case, 7,188.75 dollars, represent the difference between what Mr. Faraca would have made as a Cottage Administrator and what he actually did make during the period in question. Given the fact that the loss was caused by a statutory violation on Dr. Clements' part, the remedy is necessary, appropriate and a reasonable form of relief. *See Smith v. Board of Education*, 365 F.2d 770 (8th Cir. 1966).

[4, 5] Finally, Dr. Clements asserts that even if damages are normally proper in Section 1981 actions they should not be awarded against him personally in this case since he proceeded on the basis of a good faith concern for the program he was administering as to the consequences which would flow from employing Mr. Faraca in the capacity of Cottage Administrator and not out of any personal bias or prejudice. Such considerations may be found persuasive in considering the right of Dr. Clements to seek reimbursement from his employer, however they are irrelevant to a determination of the right to and appropriateness of relief available to Mr. Faraca as compensation for the loss of this employment opportunity. A brief recurrence to school desegregation precedents reminds us that a public official cannot find sanctuary from the consequences of an act of racial discrimination in a fear that public reaction will bring unfavorable results. *E.g., Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5 (1968); *Bell v. West Point Municipal Separate School Dist.*, 446 F.2d 1362 (5th Cir. 1971). The district court correctly distinguished Dr. Clements' knowing failure to obey the

law in a good faith fear of the consequences which could ensue, from the situation of a public official who violates a citizen's rights in executing his duties in a way that he in good faith believes the law to require. While the latter may constitute a legitimate defense to a claim by an injured party, the former does not. *E.g., Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288 (1967); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

The judgment appealed from is

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1526

D. C. Docket No. CA-15824

MR. AND MRS. ANDREW STEPHEN FARACA,
Plaintiffs-Appellees,

versus

DR. JAMES D. CLEMENTS, Individually, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Georgia

Before MORGAN and CLARK, Circuit Judges, and RUBIN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

January 17, 1975

Issued as Mandate:

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE No. 15824

MR. AND MRS. ANDREW STEPHEN FARACA vs. DR. JAMES D. CLEMENTS, Individually and GEORGIA RETARDATION CENTER	JUDGMENT

This action came on for trial before the Court, Honorable SIDNEY O. SMITH, JR., United States District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that plaintiff ANDREW STEPHEN FARACA recover of the defendant DR. JAMES D. CLEMENTS in the sum of $7,188.75, plus customary costs; dismissing the claim of plaintiff MRS. ANDREW FARACA; and discharging defendant GEORGIA RETARDATION CENTER, but shall bear its own costs, and refusing the award of attorneys fees.

* *

Dated at ATLANTA, GEORGIA, this 19th day of SEPTEMBER, 1973.

Filed & Entered in
Clerk's Office
September 19, 1973
BEN H. CARTER, Clerk

By: /s/ KAY BATES
Deputy Clerk

BEN H. CARTER
Clerk of Court

By: /s/ KAY BATES
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Filed in Clerk's Office Sept. 19, 1973.
Ben H. Carter, Clerk. By: JMK, Deputy Clerk.)

MR. AND MRS. ANDREW STEPHEN FARACA, *Plaintiffs*, vs. DR. JAMES D. CLEMENTS, Individually, and GEORGIA RETARDATION CENTER, *Defendants.*	CIVIL ACTION NUMBER 15824

This is a suit by the plaintiffs for alleged discrimination in employment on the basis of race occurring in July, 1971. By previous rulings of the Court, the case proceeds against the defendant, Clements, individually, for damages. 42 U.S.C. § 1981; *Sanders v. Dobbs House*, 431 F.2d 1097 (5th Cir. 1970) cert. den. 401 U.S. 948. The state agency, Georgia Retardation Center ("GRC"), remains in the case for injunctive relief only, subject to a showing of a policy, custom, or usage of racial discrimination on its behalf. 42 U.S.C. § 1983; *Baker v. City of St. Petersburg, Fla.*, 400 F.2d 294 (5th Cir. 1968). In the private claims, each of the plaintiffs seek general, special and punitive damages as well as attorneys' fees and costs.

On the evidence presented, the court makes the following:

FINDINGS OF FACT

Plaintiff, Andrew Faraca, age 32, is a white educator,

born in Wisconsin. He has attended college for nine years and holds two degrees with additional certificates in childhood training. At one time he studied for the ministry and is highly motivated in the area of social improvement for the lot of the poor, the black, and the ill-educated. During the course of such endeavors he was employed by the Urban League as head of its Concentrated Employment Program in Tampa, Florida. Additionally, he previously and presently teaches in the Hillsborough County (Tampa) school system. In 1970, he met and married his wife Ophelia Hartsfield, a black teacher in the school system. She is likewise a college graduate with additional post-graduate work, three years teaching experience, and presently working as a "drug specialist" in the Tampa system. In all respects, Mr. and Mrs. Faraca are able, intelligent, sincere persons well qualified for almost any task in the socio-educational field.

During the school vacation period in 1971, the couple visited her sister, Bernice Manning, an employee at GRC, in the Atlanta area. At the time, he had completed his contract with the Urban League and was looking for a new job; she had signed a teaching contract for the 1971-72 school year effective in a few days. They had previously considered Atlanta as a place of permanent residence because of its many educational, cultural, and recreational advantages and inquired of the sister about employment opportunities in the educational profession. This led to their contact with GRC.

The Center is one of the "bright lights" in the Georgia mental health program. It was conceived and authorized by the General Assembly in 1964 as a research and treatment center, with units at Atlanta and Athens.

Between them, they house some 550 resident retarded children, and treat some additional 200 outpatients. Of the total, some 90% are classed as severely retarded, 9% as trainable, and only 1% as educable. Dr. Clements was appointed as its first and only Superintendent and is largely responsible for its success. He holds a medical degree (Georgia) in addition to his bachelor's degree (Emory), was the recipient of a Yale fellowship in mental retardation as a pediatric specialist and has done special work in government administration at the Institute of Government, University of Georgia. He formulated the program, supervised the planning and construction of the facilities and has actively directed the Center since it opened in late 1969. There is no question regarding his ability, intelligence, and dedication to the success of the program. Its concept, insofar as the custodial and educational aspect is concerned, relies on close supervision and repetitive daily instruction to endeavor to teach those capable the rudiments of hygiene, dress, conduct, and literacy necessary to survive in modern society. In this area, it uses the "cottage system," and this operation is one of its primary divisions. It is headed by a Director of Community Living, responsible to Dr. Clements. He in turn has several high-level assistants responsible for training, research, care, etc. Additionally, each of some 20 odd cottages is headed by a Cottage Administrator, also responsible to the Director of Community Living, who supervises three shifts of Cottage Specialists and assistants who administer to the resident patients on a 24-hour basis within each cottage. Each of the jobs requires special qualifications of skills and education and were "tailored" by the State Merit System to fit the Center's needs at inception.

Internally, the Center has always operated administratively on Dr. Clements' theory that the decisicnmaking should occur at the lowest level possible, subject to broad policy initiated by the top supervisors. This direction has encouraged initiative, informality, and a relaxed atmosphere altogether desirable in such an undertaking. In its early days and at the time in question, this extended to the area of personnel recruitment. More often than not, a potential employee was recruited down the line and "sold" to the approving supervisor—in the cottage program, the Director of Community Living. In the administrative system then in effect, the applicant was at that point referred to the Personnel Director who formalized his employment without specific reference to or approval by the Superintendent, Dr. Clements.

As a state facility, GRC was subject to the State Merit System regulations and procedures. Basically, in its typical operation, the Merit System certifies five qualified job applicants for each state job vacancy and the administrator interviews and hires from that list. However, as a new facility and with the special qualifications needed and created for employment there, the GRC had few, if any, applicants through the State Merit System in 1971. As a result, its employment procedures were legitimately and properly reversed back through the Merit System. Rather than receive a pretested and pre-qualified applicant from them, the prospective GRC approved applicant was simply presented by Personnel to the Merit System for certification and approval. This could be achieved either by a battery of testing or, most commonly, by equivalent certification on the basis of weighted educational and practical experience. In this method in 1971, the Center was

able to hire 85-90% of its employees through its own recruitment and approval. Thus, State Merit certification was usually a paper formality consuming some two to four weeks, due primarily to the enthusiasm of the staff and the considerable expertise of the Personnel Director in the certification procedures.

In this situation, Mr. and Mrs. Faraca presented themselves to the Center on July 14, 1971, and filled out employment applications. He specifically asked for the job as Cottage Program Specialist, a shift position he had learned of from his sister-in-law. Mrs. Faraca made an "open" application, hopeful that the two could both obtain employment there. Initially, the two were interviewed by Ken Carter, a Cottage Program Administrator, recently transferred from Cottage #15 to #16 and seeking to staff it with Cottage Specialists and Assistants. At the time, each Cottage Program Administrator lived permanently in an adjacent apartment with his spouse and, in essence, was responsible 24 hours a day for its operation as "surrogate parents." All in all, a demanding, intimate, and responsible position. Carter was immediately impressed with the Faracas, but recognized that his credentials "overqualified" him for the shift job of Specialist. He knew of a new cottage being opened and, in his enthusiasm, envisioned Mr. Faraca as its Cottage Administrator. Additionally, he advised Mrs. Faraca (albeit mistakenly) that she could be hired as a Specialist in his or another cottage different from that of her husband's.[1] Consequently, he referred Mr. Faraca to Don Hoepner,

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[1] In fact, the Center's nepotism rules forbade her employment anywhere within the Division of Community Living. She could conceivably, however, have been employed in a separate division within the Center.

who was seeking to hire the new Cottage Administrator on behalf of the Director of Community Living, Dr. Mills. Hoepner was equally enthusiastic about the prospects and assured him that he could be hired and "cleared." Inasmuch as the Center could only employ effective the 16th and 1st of each month, he directed Faraca to come back early the next morning, have breakfast, observe the programs, meet Dr. Mills and accelerate the hiring procedures, after ascertaining that he was immediately available and that she could cancel her teaching contract after a few days in Tampa.

Dr. Mills was likewise delighted to receive Mr. Faraca's application and considered him the best-qualified applicant for the position of Cottage Administrator he had yet received. He spent 1½-2 hours interviewing him and satisfied himself that Faraca should be immediately hired. Mrs. Faraca was not interviewed by him as her employment, as proposed, would rest with one of the other Cottage Administrators. Thus, at this juncture, everything appeared agreed and all that remained was for Mills to route the application to Personnel for certification insofar as Mr. Faraca's employment was concerned. There is no doubt that it would have been routinely granted, considering his qualifications. On his part, nothing remained for Faraca to do to perfect his application and employment.

However, at this point in time, perhaps recognizing the implications of the mixed marriage in a state facility, Mills elected to confer with Dr. Clements before doing so. Mills is a highly-educated seemingly brilliant sociologist and was specifically recruited by Clements to head up the Division of Community Living. However, he is strong-willed, independent, and self-sufficient.

These traits had led to the beginning of a conflict between him and Clements, equally strong-willed, in the early summer of 1971. For his part, Clements was critical of Mills' slovenly administration of the Division, his failure to follow what few paper procedures were extant, and in the quality of some of the Cottage Administrator house parents hired by Mills. At least one unpleasant episode had resulted in Clements discharging an unsatisfactory Administrator under Mills. For his part, Mills had assembled an enthusiastic and loyal staff, was proud of his program, and resented any interference by anyone in its operation. While each man respected the other's abilities, it was apparent that the personality clash between the two was serious.[2] While no written policy on this particular hiring situation had been published, Clements had directed Mills to confer with him regarding any application which Mills considered controversial or which caused him concern. The Faraca application was the first such presented to Clements for prior approval. On the morning of the 15th, Mills presented it to Clements at a conference arranged for discussion of other matters. Clements agreed that Faraca was overqualified for the position of Specialist. At the time, he knew the position of Assistant Director of Community Living (a higher position on Mills' staff) would be vacant soon and believed Faraca well-qualified for that job also. However, as to his filling the position of Cottage Administrator and the couple residing at the Center, Clements had grave doubts. As a fully integrated center,[3] there had already been criticism from segments of the public and, more

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[2] It eventually resulted in Mills' 1972 dismissal, initially upheld by the Merit Board, and now under appeal.

[3] As will be discussed subsequently.

importantly, from the patron-parents of the patients, whose visitation and cooperation was essential to care and treatment. Consequently, Clements had sincere concern about the effects of the mixed couple on the visiting public and possibly the reactions from state legislators. As a result, he disapproved the proposed employment on the grounds that "Georgia is not yet ready for an inter-racial couple to serve as house parents in a state facility."

Under the circumstances, Mills' reaction was predictable. While he sincerely resented the implied injustice in the disapproval on such grounds, he was obstinate in his refusal to work something out. Specifically, Clements authorized employment as a Cottage Specialist. Upon Clements' request to meet Faraca to explore other and possibly more remunerative employment possibilities at the Center, he responded that Faraca was "not interested in anything else." It is likely that Mills perceived in the situation an opportunity for a power confrontation with Clements.[4] At any rate, he broke off the conference. Clements, in fact, assumed the application was withdrawn and the subject closed. Later that night at a meeting in the Cottage area for other purposes, the subject was raised again and Mills asserted to Clements that "he had a moral obligation to hire Faraca and would offer him the job." Clements responded that the Center couldn't hire on moral grounds, reiterated his concern, told Mills to fill the position from some dozen other applicants within the Center, and informed him that if he offered the job

[4] Shortly thereafter, a petition was circulated and presented, signed by a number of employees, mostly from Mills' division, objecting to the handling of the Faraca application and supporting Mills' position.

to Faraca that he would be fired for "insubordination." At a subsequent staff meeting on July 20th, the incident was reviewed and specific hiring policies evolved regarding Mills' role. In this and another confrontation in Mills' office, Clements restated his reasons for the disapproval of the Faraca employment on the grounds of concern for public criticism of the racially-mixed marriage. (See D Ex. #1).

Meanwhile, at about 3:00 P.M. on the 15th, Hoepner reported to Faraca that he could not be employed as a Cottage Administrator because Clements didn't want a mixed couple on campus. He was informed that he could only be hired at the lower level of Specialist. However, at that time he felt unwanted and rejected and did not wish the job. He and his wife made an effort the next day to see Clements, but unfortunately did not do so. Someone told them they could not see him. Neither Clements nor his personal secretary were informed of the request. After receiving some preliminary advice in Atlanta, they returned to Tampa. Subsequently, he complained to the NAACP, EEOC, ACLU, HEW and assorted organizations. On July 26th, he wrote a registered letter to Clements in which he formally complained. Clements, on advice of state counsel, did not reply. For her part, Mrs. Faraca assumed her application was dependent on his and pursued it no further after the 16th. This suit followed.

In truth it results from a series of judgment errors and could have been avoided by one or more of the persons involved. Dr. Clements is himself anything but racist. His refusal was patently reasoned on the projected opinions of others, not that of his own personal desires. The GRC is itself as thoroughly integrated as any public

institution known to the court and has been since inception, both as to patients and staff. Some 50% of the staff (35 to each cottage) in the Division of Community Living, the most public of all departments, is Black and 31% of the entire Center staff is Black. Most impressively, two-thirds of the 31% are employed at the administrative level, including the Director of Admissions, Director of Personnel Recruitment, Director of In-Service Administration, and Assistant Residential Director. Additionally Clements himself has worked out a grievance procedure for Black employees with the outside housekeeping contractor. There is no showing that the state center has a policy, custom, or usage of racial discrimination and no showing that Clements as Superintendent has such a policy on its behalf and any allegations to such effect fail. To the contrary, both demonstrate general compliance with the letter and spirit of the laws against racial discrimination.

Damages

By stipulation of counsel, the position of Cottage Administrator for which Mr. Faraca was disapproved paid the following wages during the period in question:

PERIOD	RATE Monthly	TOTAL
7/1/71 - 12/31/71	$711.50	$ 3,913.25 (5½ Mos.)
1/1/72 - 6/30/72	745.50	4,473.00 (6 Mos.)
7/1/72 - 12/31/72	781.50	4,689.00 (6 Mos.)
1/1/73 - 6/30/73	818.50	4,911.00 (6 Mos.)
7/1/73 -	849.50	849.50 (1 Mo.)
		$18,835.75

In addition, for a monthly charge of $56.00, he would have received room, board, and utilities for himself and wife. These services were reasonably worth $3,000.00

per year or $250.00 per month. Thus, he would have received, in addition to salary, the following:

24½ mos. × $194.00 ($250.00 – $56.00) = $4,753.00.

Under the evidence, he was hired for the school years 1971–72 and 1972–73 on contracts running from August to August at the following salaries:

1971–72	$ 8,100.00
1972–73	8,300.00
TOTAL	$16,400.00

Mr. Faraca's total loss in salary and services between the two positions was $7,188.75.[5]

By stipulation, the position of Cottage Specialist, for which Mrs. Faraca was considered, paid the following during the period in question:

PERIOD	RATE Monthly	TOTAL
7/1/71 - 12/31/71	$591.50	$ 3,217.25 (5½ Mos.)
1/1/72 - 6/30/72	619.50	3,717.00 (6 Mos.)
7/1/72 - 12/31/72	648.50	3,891.00 (6 Mos.)
1/1/73 - 6/30/73	679.50	4,077.00 (6 Mos.)
7/1/73 -	710.00	710.00 (1 Mo.)
TOTAL		$15,612.25

Under the evidence, she received the following sums from the Hillsborough County School System during the time:

1971–72	$ 8,100.00
1972–73	8,500.00
TOTAL	$16,600.00

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[5] Gross salary ..... $ 18,835.75
Fringe benefits 4,753.00
$ 23,588.75
Less salary received ..... −16,400.00
NET LOSS ..... $ 7,188.75

Mrs. Faraca, therefore, suffered no loss in income,[6] except derivatively through her husband.

Plaintiff's counsel have expended 113.7 total hours in preparation and presentation of this case. Such services are reasonably worth the sum of $3,979.50 according to the customary charges in the Atlanta area by practicing attorneys with experience similar to that of counsel in this case.

The actions of Dr. Clements were not personal, malicious, wanton, or gross. In fact, he had not seen the Faracas until the trial of this case. As already observed, the actions were the result of sincere belief and concern on his part.

CONCLUSIONS OF LAW

By its terms, the benefits of § 1981 in one respect flow to everyone, irrespective of race. Thus, "all persons . . . shall have the same right in every State . . . to make and enforce contracts." While it is true that Mr. Faraca is Caucasian, it is apparent to the Court that the protection of § 1981 extends to him in connection with his marriage rights and all contracts in which his marriage relationship is weighed as a factor. The Fourteenth Amendment prohibits *all* invidious racial discriminations. Thus *any* actions based on a classification of race or privity by race are clearly arbitrary and violative of the proscriptions against racial discrimination. The Supreme Court decisions in *Loving v. Virginia*, 388 U.S. 1 (1967) and *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), when super-

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[6] Gross salary ..... $ 15,612.25
Less salary received 16,600.00
NET GAIN ..... $ 987.75

imposed on the provisions of the Fourteenth Amendment and § 1981, leave little room for doubt as to such conclusion. The former, of course, upheld the right to enter into a marriage contract free of the proscriptions of state miscegenation laws. The latter granted a white complainant the right to sue for damages for expulsion from membership in a community recreational club by virtue of his assignment of qualifying property rights to a Black. If a technical ruling is needed, Mr. Faraca has standing to vindicate the constitutional rights of his Black wife and their marriage relationship. See *Barrows v. Jackson*, 346 U.S. 249 (1953). See also *Walker v. Pointer*, 304 F.Supp. 56 (N.D. Texas 1969), citing *Lombard v. Louisiana*, 373 U.S. 267 (1963) and *Valle v. Stengel*, 176 F.2d 697 (3rd Cir. 1949).

In this context, the court must find Dr. Clements' actions racially discriminatory. While, as seen, he proceeded on the basis of a good faith concern for the consequences of employing Faraca, and not out of personal bias, prejudice, or the subjective desire to discriminate, such concern is deemed to be unlawful. His decision, while bona fide pragmatic, is simply not legal. It is now quite clear that fears of the consequences, irrespective of the amount of underlying honest good faith belief or their factual reality, do not operate to excuse or justify an act of racial discrimination. *E.g. Cooper v. Aaron*, 358 U.S. 1 (1968); *United States v. Hinds County School Board*, 417 F.2d 852 (5th Cir. 1969); *Bell v. West Point Municipal Separate School District*, 446 F.2d 1362 (5th Cir. 1971); *Calhoun v. Cook*, ____ F.2d ____ (5th Cir., Oct. 6, 1972) (unpublished opinion).

There is a distinction between a failure to obey the law in a good faith fear of the consequences and an

affirmative execution of what in good faith is believed to be the law. The latter can form a good defense. *E.g. Monroe v. Pape*, 365 U.S. 167 (1961); *Pierson v. Ray*, 386 U.S. 547 (1967) and their progeny. Nor do the circumstances admit discretion such as that found in the early cases of *Tenney v. Brandhove*, 341 U.S. 367 (1951) and the like.

Insofar as the effect, Mr. Faraca clearly was denied employment on the grounds of his interracial marriage and is entitled to recover.

However, it does not appear that Mrs. Faraca's negotiations had ripened to such a point. The only job discussed with her was that of Cottage Specialist for which she was disqualified by the standing non-racial nepotism policy. As seen, she has suffered no pecuniary loss. At most, the court might conclude that she was denied the opportunity to be considered for other positions because of the disapproval of her husband's application. However, she impliedly withdrew her application when her husband was disapproved. Under such circumstances, any right to recover is doubtful. If such a right exists, it would carry with it a claim for nominal damages. They are generally defined as "a sum sufficient to carry the court costs." Inasmuch, as the joint plaintiff will recover and the costs are not separable, such a result will occur anyway. Accordingly, except derivatively through her husband, Mrs. Faraca is not entitled to recover.

As there is no showing of any policy or plan of discrimination on the part of the Georgia Retardation Center itself, neither party is entitled to any relief against it.

There remains the question of damages. Dr. Clem-

ents, although acting in an official capacity, is personally liable. Recovery is governed by general principles and includes special damages when proved, nominal damages in the absence of special damages, and punitive damages when warranted. See generally *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *Lee v. Southern Home Sites Corporation*, 429 F.2d 290 (5th Cir. 1970); *Sexton v. Gibbs*, 327 F.Supp. 134 (N.D. Texas 1970), aff'd 446 F.2d 904 (1971), cert. den. 404 U.S. 1062 (1972). Generally speaking, a successful plaintiff in a § 1981 or § 1983 employment action is entitled to be placed in the same position he would have been if hired. *E.g. Rolfe v. County Board of Education of Lincoln County, Tenn.*, 391 F.2d 77 (6th Cir. 1968); *Ramsey v. Hopkins*, 447 F.2d 128 (5th Cir. 1971). In this instance, the difference in the amount which would have been earned by Mr. Faraca and the amount actually earned by reasonable diligence is $7,183.75.

Additionally, plaintiff seeks to recover punitive damages. In view of the facts as already determined, the Court finds no basis for such an award. The imposition of punitive damages in such cases is not favored and is generally reserved to those instances where the defendant acts deliberately, wilfully and in gross disregard for the rights of others; or where such acts are done in a spirit of mischief and wantonness. *Lee v. Southern Home Sites Corporation*, 429 F.2d 290 (3,4,5,6) (5th Cir. 1970); *Callahan v. Sanders*, 339 F.Supp. 814 (M.D.Ala. 1971); *Urbano v. McCorkle*, 334 F.Supp. 161 (D.N.J. 1971). Here there was no malice whatsoever and plaintiff had no prior specific knowledge of the impropriety of his actions, negating wilfullness. Apparently, Clements believed such considerations were proper. The claim for punitive damages is, therefore, denied.

Finally, there is the difficult question of attorneys' fees. The Court has no inclination to penalize the defendant any further than is warranted. Conversely, the plaintiffs are completely innocent of any wrongful conduct and attorneys' fees will diminish the net recovery. As between the two, the Court would opt for a reasonable award. However, this Court has consistently followed what appears to be the soundest approach in such cases and as indicated in the Fifth Circuit opinions on the subject.

As a general rule, "attorneys fees" are historically beyond the scope of taxable costs in this country. *Globemaster, Inc. v. Magin Am. Corp.*, 386 F.2d 420 (6th Cir. 1967). Their award necessarily requires a permitting statute, a contractual obligation, or an equitable discretion in the trial court. *Brisacher v. Tracy Collins Trust Company*, 277 F.2d 519 (10 Cir. 1960); *Williams v. Kimbrough*, 415 F.2d 875(3) (5th Cir. 1969). Of course, there are many statutory civil rights actions which expressly authorize an award or to which the courts have appended such authorization. The Civil Rights Act of 1964 is a prime example. *E.g.* 42 U.S.C. § 2000e-5(k); *Long v. Georgia Kraft Company*, 455 F.2d 331 (5th Cir. 1972). However, in the nonstatutory civil rights actions under § 1981 and § 1983, there is great disparity. Thus, in private actions, attorneys fees are sometimes allowed and sometimes refused. Compare *Lyle v. Teresi*, 327 F.Supp. 683 (D. Minn. 1971) with *Arrogo v. Walsh*, 317 F.Supp. 869 (D. Conn. 1970). Ordinarily, the incentive in individual cases is found in the right to seek punitive damages, even in the absence of actual damages. *E.g. Sexton v. Gibbs*, 327 F.Supp. 134 (N.D.Tex. 1970), aff'd 446 F.2d 904 (1971). There-

fore, the award of attorneys fees is generally limited to the rare case of gross injustice to masses of people.

One of the best discussions of the whole subject is found in *Lee v. Southern Home Sites Corporation*, 429 F.2d 290 (5th Cir. 1970). There, it is recognized that in civil rights cases, there is the equitable discretionary power to award attorneys fees. However, such awards are usually reserved to racial cases where the defendant's acts are "unreasonable and obdurately obstinate" [*Williams v. Kimbrough*, 415 F.2d 874 (5th Cir. 1969)], or done in "bad faith" [*NAACP v. Allen*, 340 F.Supp. 703 (M.D.Ala. 1972)]. Perhaps the best approach is to utilize such awards as a punitive measure in those cases "of long and continuous discrimination involving considerable numbers of people," especially where the law is settled and clear or personally known to the defendant. *Sims v. Amos*, 340 F.Supp. 691 (M.D.Ala. 1972), aff'd 41 U.S.L.W. 3221 (1972) falls into such category. Thus, a refusal to correct a public wrong in the face of an obvious duty to do so is appropriate for such action. This comports with the theory of rewarding the "private attorney general." Cf. *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968). The thrust of the current opinions is to allow them in class-type cases involving racial or sex discrimination which inure to the benefit of a large group of persons similarly situated. *Cooper v. Allen*, 467 F.2d 836 at 841 (5th Cir. 1972); *Jinks v. Mays*, 464 F.2d 1223 (5th Cir. 1972).

Measured by the above, the court finds this case inappropriate for such remedy. In the exercise of discretion, the award of attorneys fees is, therefore, refused.

Accordingly, judgment may issue in favor of the plaintiff, Andrew Faraca, and against the defendant,

Dr. James D. Clements, in the sum of $7,188.75 plus customary costs. The claim of Mrs. Andrew Faraca is dismissed. The defendant, Georgia Retardation Center is discharged, but shall bear its own costs.

IT IS SO ORDERED.

This the 19th day of September, 1973.

/s/ SIDNEY O. SMITH, JR.
SIDNEY O. SMITH, JR.
United States District Judge